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No. 80-1348

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

STATE OF FLORIDA,
DEPARTMENT OF STATE,
Petitioner,

-vs-

TREASURE SALVORS, INC.,
ARMADA RESEARCH CORP.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL
(Counsel of Record)
SUSAN E. GAMBLE
ASSISTANT ATTORNEY GENERAL
The Capitol - Suite 1501
Tallahassee, FL 32301
Phone: 904/488-9935
and

FLETCHER N. BALDWIN, JR.
Holland Law Center
University of Florida
Gainesville, FL 32611
(904) 392-2211

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Whether the Eleventh Amendment to the United States Constitution precludes an *in rem* action in federal court where the private party suit against the state has failed to demonstrate waiver of the eleventh amendment guarantee of sovereign immunity.

II. Whether the alleged mistake of fact found by the Courts below to circumvent the eleventh amendment was the result of a misinterpretation of *United States v. Florida*, which defined Florida's boundaries only for purposes of the Submerged Lands Act.

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The decision of the United States

Court of Appeals for the Fifth Circuit is

reported at 651 F.2d 1340 (5th Cir. 1981)

and is reproduced, in accordance with the provisions of U.S. Supreme Court Rule 30.1, in the Appendix to the Petition for Writ of Certiorari at A8-20.

The decision of the United States District Court for the Southern District of Florida is reported at 424 F.Supp. 702 (S.D. Fla. 1976) and is reproduced, in accordance with the provisions of U.S. Supreme Court Rule 30.1, in the Appendix to Petition for Writ of Certiorari at A81-103.

JURISDICTION

The opinion of the Court of Appeals was entered on July 24, 1980. Rehearing en banc was denied on October 17, 1980, and the mandate issued on October 24, 1980. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES
INVOLVED

U.S. Constitution, Article III,
Section 2

The judicial power shall extend
. . . --to all cases of admiralty
and maritime jurisdiction, . . .

U.S. Constitution, Amendment 11

The judicial power of the United
States shall not be construed to
extend to any suit in law or
equity, commenced or prosecuted
against one of the United States
by citizens of another State, or
by citizens or subjects of any
foreign State.

Florida Constitution, Article I
(1868)

(relevant portions of which are
set out in full in the appendix
hereto).

Florida Constitution, Article II,
Section 1 (1868 and 1968)

(relevant portions of which are
set out in full in the appendix
hereto).

Florida Constitution, Article X,
Section 13

> Suits against the state.--Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

43 U.S.C. §1301

(relevant portions of which are set out in full in the appendix hereto).

Florida Statutes, Section 267.061(2)(a)

> (2) It shall be the responsibility of the Bureau of Historic Sites and Properties to:
>
> (a) Locate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

STATEMENT OF THE CASE

Pursuant to the authority granted by the Archives and History Act, Fla. Stat.

§267.061, the State of Florida, Department of State, Division of Archives, History and Records Management entered into salvage contracts with Armada Research Corp. (Treasure Salvors, Inc.) on April 26, 1971. Under the contracts, to be renewed annually, Treasure Salvors was to conduct underwater salvage upon what was believed to be the Nuestra Senora de Atocha, which sank in a hurricane in 1622. JA 20. The Atocha was thought to rest upon bottomlands within the territorial jurisdiction of the state of Florida, off the Marquesas Keys.

Under the terms of each contract, Treasure Salvors received seventy-five percent (75%) of the artifacts recovered. In addition, the State was to provide an on-site salvage field agent for the purpose of recordation of data, authenti-

cation, and scientific evaluation, JA 31, as well as the services of the State Underwater Archeology Laboratory for the purpose of archeological analysis and full-scale preservation technology. JA 25, 29, 35, 36. The salvage contracts on the Atocha site were exclusive, i.e., during the term of the contracts, no other contractor was allowed to salvage the site.

In return, the State was to retain twenty-five percent (25%) of the representative artifacts, JA 33, for the purposes of continuing study, examination and display. This arrangement was renewed three times, the last contract being entered into on December 3, 1974. In the interim, United States v. Florida, 420 U.S. 531 (1975), was decided, re-establishing the boundaries of the State of Florida for the purpose of the

Submerged Lands Act of 1953.

As a result of United States v. Florida, Treasure Salvors filed an in rem action in the United States District Court for the Southern District of Florida for possession and confirmation of title to the vessel Atocha. The State of Florida was not a party to that proceeding, the United States having intervened to claim ownership of the wreck under both the Antiquities Act, 16 U.S.C. §§431-433, and the Abandoned Properties Act. 40 U.S.C. §310. The District Court issued an Order of Final Judgement confirming Treasure Salvors' right to possession, Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, etc., 408 F.Supp. 907 (S.D. Fla. 1976). On appeal, the Court of Appeals for the Fifth Circuit affirmed. Treasure Salvors, Inc.

v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978) (hereinafter Treasure Salvors I).

The Fifth Circuit expressly ruled:

> . . . We do not approve that portion of its [the District Court's] Order which may be construed as holding that Plaintiffs have exclusive title to and the right to immediate and sole possession of the vessel and cargo as to other claimants, if any there be, who are not parties or privies to the litigation.

Treasure Salvors I at 336.

The present case arose through ancillary process issued by the federal district court, Southern District of Florida, pursuant to the Court of Appeals' decision in Treasure Salvors I. The District Court issued a Warrant for Arrest In Rem on April 11, 1978, JA 40, directing the marshal to take possession of all artifacts from the vessel in the custody or control of the State of

Florida's Division of Archives, History and Records Management, located in the Northern District in the State Capital, Tallahassee. Florida filed an Emergency Petition for Writ of Prohibition or Stay on April 12, 1978, which was on that same day granted by the Fifth Circuit. (R 368).

On May 15, 1978, the Circuit Court of Appeals dissolved its Emergency Stay. JA 65. The Court remanded back to the District Court for a determination of jurisdiction. JA 69. On August 21, 1978, the District Court entered final judgment in behalf of the plaintiffs, JA 84, and directed the State of Florida to relinquish possession of the artifacts to Treasure Salvors, Inc. Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 459 F.Supp. 507 (S.D. Fla. 1978).

The Court of Appeals affirmed the decision of the District Court as to jurisdiction over the State on July 24, 1980 (Rubin, J. dissenting). In re: State of Florida, Department of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980). JA 98. Florida's Petition for Rehearing en Banc was denied October 16, 1980, and the mandate issued on October 24, 1980. JA 4. The State filed its Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on January 13, 1981, and the United States Supreme Court granted certiorari on May 18, 1981. JA 4.

SUMMARY OF ARGUMENT

I.

The Court of Appeals' holding in this case departs significantly from the standards that have been announced by

this Court to govern application of the constitutional guarantee of sovereign immunity under the eleventh amendment. The factual record before the Court presented a local question involving a dispute between the State of Florida and one of its citizens, centering around the ownership of marine antiquities.

The eleventh amendment limits the power of the federal judiciary to enforce private actions against the states. Treasure Salvors, Inc. is a Florida citizen and its suit is against the State since the Division of Archives, History and Records Management is a component of the State.

Treasurer Salvors implicated the federal courts in a testing of title to the artifacts, then in the possession of the State. It was at the point in time

when the District Court attempted to adjudicate ownership that the State first asserted its claim in court. This involuntary assertion of a claim did not constitute a waiver of the State's eleventh amendment immunity.

By styling this action as an *in rem* dispute in admiralty, the Court attempted to accomplish indirectly what it could not accomplish directly: that is, taking jurisdiction over subject matter in the possession of the state government. Admiralty jurisdiction includes only maritime matters or subjects and may not be extended to non-maritime matters. But even if the matter were to be styled in admiralty, the eleventh amendment must still be taken into account when the state is a party.

Failing to recognize the underlying dispute as being one against the State of

Florida by a citizen of that State is, we submit, constitutional error that, if left to stand, will have grave consequences upon valid State concern for historic preservation.

In addition, the Court's refusal to apply the eleventh amendment to this case was made possible by a similarly misdirected interpretation of United States v. Florida, 420 U.S. 531 (1975) and 425 U.S. 791 (1976). The Report of the Special Master adopted in those decisions strongly indicates that the purpose of United States v. Florida and similar cases was to define with greater particularity the State's boundaries for purposes of the Submerged Lands Act and in no way attempts to preclude Florida's continuing acts of sovereignty within its constitutional and historical boundaries. What is more, even if the Master's Report in

United States v. Florida was correctly interpreted by the Courts below, the "mistake", if any, which it worked upon the parties' contractual relationship was a mistake of law, rather than of fact, which does not nullify a contract. This result is furthermore justified in view of the parties' having each fully executed and performed their contractual obligations by the time United States v. Florida was decided.

ARGUMENT

I. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDES AN IN REM ACTION IN FEDERAL COURT WHERE THE PRIVATE PARTY SUIT AGAINST THE STATE HAS FAILED TO DEMONSTRATE WAIVER OF THE ELEVENTH AMENDMENT GUARANTEE OF SOVEREIGN IMMUNITY.

The issue presented to this Court evolves from an action brought in admiralty in which the Respondent--a private person--sought to recover historical artifacts in the possession and under the control of the State of Florida. As noted in the Court below, these artifacts had been recovered from the remains of a sunken Spanish galleon pursuant to salvage contracts with the State of Florida. In re: State of Florida, Department of State, v. Treasure Salvors, Inc., 621 F.2d 1340, 1343 (5th Cir. 1980) [hereinafter Treasure Salvors II]. Under the terms

of these contracts, the State received twenty-five percent of the artifacts recovered. The state's interest in these artifacts is a direct result of the State's concern for its rich cultural heritage. See generally, R. Burgess & C. Clausen, Gold, Galleons And Archeology (1976). Florida was the first state to specifically include underwater archeological resources in its antiquities legislation. Fla. Stat. §§ 267.01-267.08 (1965) replaced by Fla. Stat. §§267.011-267.14 (1979) (Appendix to Petition for Writ of Certiorari, A166-219); see also Note, Cultural Resources Preservation and Underwater Archeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute, 15 San Diego L. Rev. 623, 654-60 (1978).

Nevertheless, the Court below held that the contracts at issue were the

result of a mutual mistake of fact; consequently they were invalid. Treasure Salvors II at 1344. The court therefore concluded that the suit was not a suit against the state in violation of the eleventh amendment. Id.

Petitioner contends that when the facts are examined dispassionately, the action becomes nothing more than a suit against the State of Florida by one of its citizens in federal court, in spite of the fact that the State has not waived immunity in action or in fact. It is, therefore, the State's position that by accepting this cause of action and ruling upon the substantive issue, the courts below acted in violation of the eleventh amendment to the Constitution of the United States. There is nothing in the record to suggest that the State has

consented to be sued in federal court for the recovery of property in its possession. The trial court, however, in an attempt to avoid the eleventh amendment, styled the action as an in rem proceeding in admiralty and concluded that although the State was a party to the action, the issue involved was the determination of title to the artifacts in the custody of the State's Division of Archives. Treasure Salvors, Inc. v. Unidentified and Abandoned Sailing Vessel, 459 F.Supp. 507 (S.D. Fla. 1978). The court issued its warrant for arrest in rem of all artifacts from the vessel Atocha (then in State possession) JA 40, and subsequently ordered the State to show cause why the property held by it should not be delivered into the custody of the court. JA 63. This action by the

lower court, in taking jurisdiction over the subject matter, was compounded by the Fifth Circuit Court of Appeals in a split decision, agreeing that the federal district court had jurisdiction to hear and decide the case. Treasure Salvors II at 1344-46. No matter how the court below attempted to disguise the issue, the fact remains that this action is an action brought against the State of Florida to recover property within the control and possession of the state. Such an action is a suit against the State in violation of the eleventh amendment.

A. ELEVENTH AMENDMENT APPLICABILITY IN ITS HISTORICAL CONTEXT

Even before the Constitution of the United States was ratified, the suability of a state was of major concern to the nation's founders. The judicial power of

the United States, as drafted at the Constitutional Convention, extended ". . . to controversies between a state and citizens of another state. . ." U.S. Const. art. III, §2. However, "it had been widely understood prior to ratification of the Constitution that [article III, section 2] would not provide a mechanism for making states unwilling defendants in federal court." Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291-292 (1973) (concurring opinion). The apprehension of the then severely indebted states that these debts might be prosecuted in federal court formed a serious objection to that instrument. In attempting to allay the fear of the states, Alexander Hamilton reasoned that "[t]he contracts

between a nation and individuals are only binding on the conscience of the sovereign and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." The Federalist No. 81 , at 549 (Cooke ed. 1961)(A. Hamilton). The suggestion that the provision allowed a citizen of one state to sue another state was also the subject of much discussion at the ratification conventions. James Madison responded that "[i]t is not in the power of individuals to call any state into court. The only operation it [the provision] can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court." 3 J. Elliott, The Debates in Several State Conventions on the Adoption of the Federal Constitution 533 (1876). The defenders of the new

Constitution thus put these fears to rest by assuring the delegates that state sovereign immunity would survive under article III.

Four years after the Constitution was adopted, the problem of the meaning of the provision was before the court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). In Chisholm, two citizens of South Carolina brought an original action of assumpsit in the Supreme Court against the State of Georgia. Departing from the framers' intent that states be immune from private suits, the court sustained federal jurisdiction, with each justice penning a separate opinion, based primarily upon a literal reading of article III, section 2. The people of each state, said the court, consented to the suability of their states in federal

court upon the adoption of the new Constitution. Id. at 433. The decision evoked such immediate adverse public reaction that within one year the eleventh amendment, the purpose of which was to overturn Chisholm, was proposed and passed in both Houses of the Legislature.[1] It was subsequently ratified in 1798. Since the Amendment explicitly excludes only suits against the State brought by citizens of another state, it remained for the Court to decide whether the provision was applicable to suits by a citizen against his/her own State.

[1] Hans v. Louisiana, 134 U.S. 1, 11 (1890). See Jaffe, Suits Against Governments and Officers, 77 Harv. L. Rev. 1, 20 (1963); Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1414, 1430-41.

In Hans v. Louisiana, supra note 1, the plaintiff, a citizen of Louisiana, sued Louisiana to recover the proceeds from state-issued bonds, which were later repudiated by the Legislature. Plaintiff contended that the repudiation of the bonds was in violation of article I, section 10 of the Constitution, which provides that "no state shall. . .pass any law. . .impairing the obligation of contracts." Since the action arose under the Constitution, the plaintiff argued that the federal court had the power to adjudicate his claim. However, the Court queried, could it be supposed "that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, whilst the

idea of suits by citizens of other states, or of foreign states, was indignantly repelled?" Id at 15. This applicability of the eleventh amendment to suits against a state by it's own citizens has been construed repeatedly by the Supreme Court to cover such actions. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974).

Although Hans, as the first case sustaining a state's claim of immunity from federal suits brought by its citizens, did not ground immunity in the Constitution, nearly all of the cases which have relied upon Hans have tended to regard that immunity as a part of the eleventh amendment and thus Constitutional in nature. See, e.g., Employees of the Department of Public Health & Welfare v. Department of Public Health

and Welfare, supra, at 285 ; Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Ex parte Young, 209 U.S. 123, 150 (1908); Chandler v. Dix, 194 U.S. 590, 591 (1904).

B. THE STANDARDS FOR DETERMINING ELEVENTH AMENDMENT APPLICABILITY WERE IGNORED BY THE COURT IN TREASURE SALVORS II.

The history surrounding the Constitution and the rapid passage of the eleventh amendment demonstrates the high value which the framers and the states placed upon sovereign immunity. This value is exemplified by the Constitutional strength attached to the doctrine of sovereign immunity. Yet, this fact was seemingly overlooked by both the trial court and the appeals court in their eleventh amendment analyses of the issue as presented in Treasure Salvors II.

In Ford Motor Co., supra, at 462, the court enunciated a two-part test for determining the existence of eleventh amendment immunity from suit: 1) whether the action is against the state, and 2) if the action is against the state, whether the state consented to be sued. See also, Edelman v. Jordan, supra. Thus, once it is determined that the suit is against the state, the eleventh amendment would preclude federal jurisdiction over the action, Hans v. Louisiana, supra, at 3, provided the state had not consented to be sued. See also Parden v. Terminal Ry., 377 U.S. 184 (1964); Clark v. Barnard, 108 U.S. 436, 447 (1883).

As to part one of the Ford test, the general rule for determining whether a suit is against the sovereign was articu-

lated in Dugan v. Rank, 372 U.S. 609, 620 (1963):

> . . .a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or to compel it to act. (Citations omitted)

Id. at 620. Thus, whether a political entity is an arm of the state or a non-immune political subdivision "depends in part upon the nature of the entity created by state law." Mt. Healthy City School District v. Doyle, 429 U.S. 274, 280 (1977). The Florida Department of State is an entity, the nature of which directly involves the administration of matters under the domain of state law. Accordingly, the Division of Archives,

History, and Records Management of the Department of State is an operating unit of the sovereign and functions as an arm of the State to implement Florida State policy relating to the location, acquisition, protection and preservation of historic sites and properties as mandated by Fla. Stat. §267.061(2)(a)(1979). See J. Ray McDermott & Co. v. Department of Highways, 267 F.2d 317 (5th Cir. 1959); Savoy v. Kawasaki Motor Corp., 472 F.Supp. 1216 (E.D. Pa. 1979).

If a federal court has any question as to whether the action against the entity is in fact against the state for purposes of eleventh amendment immunity, Mr. Justice Reed indicated that a federal court must look to the law of the appropriate state for guidance. Ford

Motor Co., supra, at 463. Accordingly, the Florida Supreme Court, in Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 326 (Fla. 1925), concluded that a suit involving a contract or property right of the State Board of Education with reference to property owned or held by the Board is in legal effect a suit against the State and cannot be maintained insofar as it affects property rights of the State or seeks to enforce a contract made by or for the State, unless the consent of the State is duly given. See also Louisville & Nashville Railroad v. Railroad Commissioners, 63 Fla. 491, 58 So. 543 (Fla. 1912); McWhorter v. Pensacola & Atlantic Railroad, 24 Fla. 417, 5 So. 129 (Fla. 1888).

The State of Florida is the real party in interest in this case, for not only is the preservation of its cultural heritage as a cross-roads and center of maritime commercial activity in jeopardy, but also the judgment, if in favor of Respondent, Treasure Salvors, Inc., would conclude the State by determining the State's rights. In deciding that a claimant to property might sue persons preventing him from obtaining possession of property, even though the possessors held the property on behalf of the state, the court in Tindal v. Wesley, 167 U.S. 204 (1897), reasoned that the action was not against the state within the meaning of the Constitution because the judgment would not conclude the state. Id. at 221. As succinctly stated by Judge Rubin, "Here the district court did

precisely what was implicitly forbidden by Tindal: it concluded the state from claiming ownership of the property." Treasure Salvors II at 1351 (Rubin, J. dissenting).

At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession (now in the hands of Treasure Salvors Inc.). This controversy, which seeks to affect the property rights of the State of Florida to its artifacts, falls explicitly within the holding in Hampton. It also is encompassed within the reasoning of Louisiana v. Jumel, 107 U.S. 711 (1882), which held that suits against state officers to recover, or direct the disposition of, property in the possession of the state are generally regarded as suits against the state within the pro-

hibition of the eleventh amendment. Thus supported by both rationales, the present cause of action is clearly against the State of Florida, without whose consent such suit cannot be maintained in federal court. See also Scheuer v. Rhodes, 416 U.S. 232, 237 (1974); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet) 110 (1828).

The second part of the Ford test, (whether the state has consented to be sued) grew out of a concern for the prevention of interference with the performance of governmental functions and control over its instrumentalities, funds, and property. Great Northern Insurance Co. v. Read, 322 U.S. 47, 53-54 (1944); United States v. Lee, 106 U.S. 196, 206 (1882). This policy acknowledges the importance of the state's ability to

function efficiently and in the best interest of the public as a whole, which can be severely circumscribed if the state is continually forced to litigate suits brought by its citizens in federal court.

Such a hazard is depicted in the present fact situation. Treasure Salvors, Inc., grounding its cause of action on admiralty jurisdiction, sought an adjudication of ownership of the artifacts in the possession of the State of Florida in federal court. As noted by Judge Rubin in dissent below, Treasure Salvors II involves essentially a contract dispute--a "purely local question"--and hardly an appropriate subject for admiralty jurisdiction. Treasure Salvors II at 1351 (Rubin, J. dissenting). To adopt the position of

the majority below and permit a citizen to recover property from the state so long as an implied admiralty issue exists, would work a devastating effect on states with extensive coastlines, since it would eliminate from state adjudication a multitude of issues over which federal jurisdiction was not meant to extend. Such action by the Court below totally ignores its prior decisions which directly hold that a state may invoke its eleventh amendment defense in admiralty actions. J. Ray McDermott & Co. v. Department of Highways, 267 F.2d at 318; Intra Coastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975). Accord, Red

Star Towing and Transportation Co. v. Department of Transportation, 423 F.2d 104 (3rd Cir. 1970); Sehlmeyer v. Romeo Co., 117 F.2d 996 (9th Cir. 1941).

The appeals court's reliance on the genre of cases allowing it jurisdiction to determine jurisdiction, and thus deciding a suit over state-claimed property on its merits, disregards the fact that a state may invoke its eleventh amendment defense in admiralty. According to Judge Rubin, this is "equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." Treasure Salvors II at 1351 (Rubin, J. dissenting).

The interest of an efficient government would be jeopardized if claims only tangentially or impliedly supporting

federal jurisdiction were sustained. To allow a federal court to adjudicate, without more, a purely local question would not only interfere with the responsibilities and functions of the state with regard to historic preservation, but would also be a drastic erosion in the state/federal dichotomy, a notion upon which this nation was founded.

Petitioner does not mean to imply that this strong government interest should be followed in a myopic fashion to bar every action which causes undue interference with the operations of government. Cases involving individuals who have suffered an invasion of their rights by state officials acting under an unconstitutional statute or in excess of their statutory authority have been per-

mitted to adjudicate those rights in federal court. Ex parte Young, 209 U.S. 123 (1908); Georgia Railroad & Banking Co. v. Redwine, 342 U.S. 299 (1952).

The interests of the individuals in such actions are weighed heavily in their favor, as it seems illogical to allow the government to claim that its governmental functions are being unduly interfered with when the exercise of the function complained of is either unconstitutional or unsupported by statutory authority. Although these cases have recognized an exception to the eleventh amendment, no identifiable exception is at issue in the present case. Treasure Salvors, Inc. asks merely for a determination of ownership to the artifacts in the possession of the State of Florida. Treasure Salvors II at 1341.

As both federal and state governments expand their scope of activities through enlarged and additional agencies, states are facing a dramatic increase in the number of litigants who are attempting to utilize federal courts, seeking remedies against states or their agents. See Note, A Practical View of the Eleventh Amendment--Lower Court Interpretation and the Supreme Court's Reaction, 61 Geo. L.J. 1473 (1973). The mere litigation of these suits creates a burden on the state--a fact to be considered when the potential interference with governmental functions is examined in the determination of whether the suit is in fact one against the state. As stated in Read,

> A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents action against a state by its own citizens without its consent.

322 U.S. at 51. This consent is not derived from the Constitution or laws of the United States, but exists only upon the consent of the state. Palmer v. Ohio, 248 U.S. 32, 34 (1918).[2]

The traditional approach to waiver of eleventh amendment immunity, and one consistently adhered to by this court, is that waiver can be shown only "by the

[2] "Waiver" and "consent" are seemingly used interchangeably. See, e.g., Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945). It would appear that "consent" would be used to indicate expressed permission, whereas "waiver" would apply to cases of implied consent.

most express language or by such overwhelming implication from the text [of the state statute or Constitution] as would leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909); Edelman v. Jordan, 415 U.S. at 673. This approach gives effect to the states' authority to grant or withhold consent, as determined according to state, not federal, law. Ford Motor Co., supra. As noted earlier, the Florida courts have adopted the Read rationale of sovereign immunity and waiver; also, in a vein similar to Murray, the Constitution of Florida has been interpreted to require that unambiguous statutory language be used in order to effect a waiver of sovereign immunity. Manatee County v. Town of Longboat Key, 265 So.2d

143 (Fla. 1978).

Notwithstanding that the Florida Constitution authorized the legislature to waive sovereign immunity, Fla. Const. art. 10, §13 (1979), the legislature has not so declared with regard to suits in federal courts to recover property of the state.

Section 69.041(b), Fla. Stat. (1979), referred to by the trial court in dicta, provides that Florida may be sued in state or federal courts "[f]or the foreclosure of a mortgage or other lien on real or personal property on which the state has or claims a mortgage or other lien". The statute is not a waiver of Florida's eleventh amendment immunity from suits filed in federal courts to recover property of the state. In view of the mandate handed down in Edelman v. Jordan, supra, at 673, a

statute which purports to waive sovereign immunity must be strictly construed. To appropriate the statute's terminology as the trial court did so as to include a suit to recover property of the state under the guise of a salvage lien, is a misapplication of the statute in direct contravention to Edelman and ignores the "express language" requirements set forth in Murray and Manatee County, supra.

The State of Florida has not claimed a mortgage or other lien on the artifacts, as claimed by the trial court, but has asserted ownership of them. The statute has rightfully been interpreted to be a lien statute only, Seaside Properties, Inc. v. State Road Department, 121 So.2d 204 (3d D.C.A. Fla. 1960), and so, without a claim of lien by the state, the statute cannot be con-

strued to waive Florida's eleventh amendment immunity. This controversy involves a testing of title to cultural/historical resources, which is a local question governed by State law. Thus, since the matter at issue has been reserved to state adjudication, the lower court erred in permitting Treasure Salvors, Inc. to summon the State into federal court.

C. THE COURT OF APPEALS MISAPPLIED THE IN RE NEW YORK COMPANION CASES.

In affirming the trial court, the Appeals Court in Treasure Salvors II developed three major arguments for federal jurisdiction: 1) Although the eleventh amendment is applicable to admiralty in rem actions, its effect is merely to create a rebuttable pre-

sumption which, if defended, does not bar federal jurisdiction; 2) such jurisdiction, based upon a determination of the merits of a case, is sanctioned by the "jurisdiction to determine jurisdiction" line of cases; and 3) this approach is favored by the fact that federal courts have exclusive jurisdiction over admiralty in rem proceedings.

As to the first argument of the court, it must be urged that the eleventh amendment does apply when, as in this case, a plaintiff attempts to sue his/her state in federal court. Hans v. Louisiana, 134 U.S. at 3; North Carolina v. Temple, 134 U.S. 22, 30 (1890). The eleventh amendment also applies to maritime cases. See In re New York, 256 U.S. 490 and 256 U.S. 503

(1921). The majority opinion would, however, establish a novel theory of Constitutional law, stating that the eleventh amendment merely creates a rebuttable presumption in favor of the state, defeasible upon the introduction of facts which, if believed, would support a finding in favor of the plaintiff. The plaintiff, so the reasoning goes, must contend that the state has no real interest in the case since the property or other right asserted by the state is actually the property of the plaintiff. This argument obviously begs the jurisdictional question in the most fundamental way, since it merely reasserts the plaintiff's position on the merits. The majority is apparently extrapolating from Ex parte Young, supra, without saying so.

That case employed the legal fiction that a state cannot order its officer to perform an unconstitutional task; thus, a suit under the fourteenth amendment against such an official would not be barred by the eleventh. There is a wide gulf between Young's statement that an official cannot officially perform an unconstitutional act and the proposition that a state cannot assert a losing claim in contract. Judge Rubin's position, that the eleventh amendment is a constitutionally created irrebutable presumption, is far more reasonable and in keeping with case precedent and Constitutional history.

The majority justifies its position by citing the In re New York companion cases, supra. Both actions arose from a

maritime disaster on the Erie Canal involving tugboats operated by the State of New York. The first case involved a tug leased by Edward Walsh in his capacity as Superintendent of Public Works for the State of New York; the jurisdiction was in personam. The Supreme Court of the United States, in dismissing the suit for want of bonafide jurisdiction, stated:

> That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.

In re New York, supra, at 497.

The companion case, In re New York, 256 U.S. 503 [hereinafter The Queen City], involved a tug owned by the State, in which jurisdiction in rem was based upon a libel in admiralty against the tug itself. New York's Attorney General asserted that the tug was the property of the State and that the suit was therefore barred by the eleventh amendment. The plaintiff countered that the tug was not State property but offered no evidence to that effect (other than that the record and proceedings in the court below did not reveal any official documents proving it). The Court found that the Attorney General's affidavit established the State's possession without any need for further verification and, thus, held that the eleventh amendment prohibited the federal court from exercising jurisdic-

tion over the subject matter.

The majority in Treasure Salvors II opines that it can be inferred from The Queen City that had a genuine controversy as to the ownership of the tug been presented, the Court would have been obliged to decide the question. Then, if the Court in The Queen City had determined that the property did not in fact belong to the State, it would have been justified in concluding that since New York had no genuine interest in the case, the eleventh amendment would not have been applicable. Treasure Salvors II, supra, at 1345.

As Judge Rubin points out however, merely to accept the State's affidavit of ownership, absent a special challenge, does not imply that a controverted claim justifies federal jurisdiction. Id. at

1351 (Rubin, J. dissenting). Judge Rubin is correct: the court in The Queen City did not speak in terms of presumptions. Since presumptions have independent evidential significance, to accept such an interpretation would constitute an alteration of the law beyond that which was intended.

Treasure Salvors II further expanded the holding of The Queen City when the majority construed the presence of the controverted claim in the matter before it to be the "special challenge" envisioned by the Court in The Queen City which would "operate to rebut the presumption of validity attributed to the state's ownership claim." Treasure Salvors II, supra, at 1345. The Queen City in no way articulated the circumstances which would constitute "special

challenge" or the effect of the presence of a special challenge on the state's claim, should such a challenge have been advanced. Hence, the Court below misconstrued The Queen City when it interpreted that the presence of a special challenge operated to rebut the presumption of validity attributed to a state's ownership claim. The opinion in The Queen City makes reference only to the uncontroverted claim at issue. The opinion is devoid of language which would support the converse reasoning adopted by the Court of Appeals in Treasure Salvors II: that is, if a challenge to state ownership is present, the controversy ipso facto becomes an appropriate subject for admiralty jurisdiction.

In accepting the state's suggestion of ownership, the Court in The Queen City

noted that "[i]t would be an unwarranted aspersion upon the honor of a great state to treat facts thus solemnly certified by its chief officer. . .as now requiring verification." The Queen City, supra, at 509. The court's reliance stemmed from the suggestion of ownership coming through official channels, rather than from private counsel appearing as amici curiae, as was the case in In re Muir, 254 U.S. 522 (1921). The facts in the present case would similarly support such confidence and credence as the State of Florida's assertion of ownership also came through official channels.

The conclusion reached by the Court in Treasure Salvors II is in error and is an illogical completion to the syllogism, unsupported by The Queen City. Further-

more, such a result is irreconcilable with the essence of the eleventh amendment, particularly when, as here, the determination of ownership of the artifacts involves the adjudication of an underlying contract dispute between a citizen of Florida and the State itself, "a purely local question." Treasure Salvors II at 1351 (Rubin, J. dissenting). What is more, as noted by Judge Rubin, neither of the cases known as In re New York, supra, holds that a state can be brought involuntarily into an admiralty court for an adjudication of its property rights. Id. at 1350 (Rubin, J. dissenting). The facts of the instant case reveal that the claim asserted by the State of Florida was not voluntary, but was made merely to demonstrate the existence of a dispute and only in re-

sponse to the trial court's attempt to adjudicate the ownership of the artifacts. The litigation was not initiated by the State, which asserted its claim to the artifacts involuntarily and pursuant to a warrant for arrest in rem.[3] Since the conduct of the State on this latter point was not voluntary and was buttressed by the holding in Ford Motor Company,

[3] The trial court in the present case held that the Division of Archives waived the right to claim immunity from suit under the eleventh amendment by asserting its claim on the merits. This ignores Ford Motor Co., 323 U.S. at 467, which stated:

> The Eleventh Amendment declares a policy of such compelling force that this court will consider the issue arising under this Amendment even though urged for the first time in this court. (emphasis supplied)

supra note 3, at 55, the State did not waive its eleventh amendment.

Although not relied upon by the majority in Treasure Salvors II, Tindal v. Wesley, 167 U.S. 204, (1897) employed a rationale similar to the one advanced by Petitioner. In Tindal, the plaintiff claimed that the defendant was wrongfully withholding from him property which he owned in Columbia, South Carolina, The defendant asserted that he was holding it on behalf of the State of South Carolina and that the court's jurisdiction was accordingly precluded by the eleventh amendment. The court determined that since the State was not an actual party to the action (having declined to intervene) and since the State would not be bound by the de-

cision, the eleventh amendment was not applicable.

The Tindal determination, like that in The Queen City, was a bonafide jurisdictional decision and not a sneak attack on the merits. The principle actually extractable from the above predecents is that a federal court may initially investigate a claim of state involvement to ascertain whether a state is genuinely being sued in a particular case. But once the State's presence is discovered, the suit must be dismissed for want of jurisdiction.[4] Treasure Salvors II

[4] See, e.g., Cunningham v. Macon & B. R.R., 109 U.S. 446, 451 (1883)(involving a claim against state railroad property) wherein the Court stated, "[W]henever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

would, however, require the state to first prove its case rather than merely demonstrate that it has a genuine case, before federal jurisdiction is barred by the eleventh amendment. As Judge Rubin argued, this concept stretches the principle completely beyond recognition, allows the proverbial exception to swallow the rule, and thus emasculates the Amendment. Treasure Salvors II at 1351 (Rubin, J. dissenting). Under the majority's rationale, a state would be beyond federal jurisdiction only in matters in which it is able to prevail on the merits. This is no protection at all.

As to the second argument in Treasure Salvors II, the majority justifies proceeding to the merits by citing the so-called "jurisdiction to determine

jurisdiction" line of cases. The rationale is that if "the issue of jurisdiction is inextricably interwined with the merits of the controversy," Treasure Salvors II at 1345, the court may, in deciding jurisdiction, look to the merits. By so concluding, the court carried its analysis too far. Under the eleventh amendment, the state does not have to demonstrate a winning case, but rather a valid claim so as to show that it has a right to a be party. This burden should be no more than that required to overcome a motion for summary judgment. In other words, the state should be able to demonstrate a genuine controversy to which it is a party. If the eleventh amendment is to have any meaning at all, it would appear that the instant court 's rationale could even be extended

to quasi in rem actions or could plausibly include suits in which the state itself is the defendant. Once a state demonstrates its actual presence in a case, the federal court must then dismiss for want of jurisdiction.

In the present case, the warrant and show cause order were issued against the State of Florida. JA 40, 63. The issue on the merits was whether the State had property rights to artifacts in its Archives--that is, whether the contract to which the State was a party was valid. Clearly, the State was a party to and would be directly affected by the action. This is quite unlike either The Queen City or Tindal such that the court's need to even initially consider the question of jurisdiction becomes difficult to understand.

The majority in Treasure Salvors II

cites United States v. United Mine Workers, 330 U.S. 258 (1957) for the "jurisdiction to determine jurisdiction" proposition. In Mine Workers, the Norriss-La Guardia Act, 29 U.S.C. §101 (1932) forbade to federal courts jurisdiction over disputes involving labor unions and their officers against employers. When the United Mine Workers and its officers were cited for contempt, their defense was that the trial court did not have subject matter jurisdiction, that its judgement was void, and that they were therefore not in contempt. In upholding the fines against Mr. Lewis and the union, the Supreme Court held, in the alternative: 1) The Act was not intended to apply where the government, not a private employer, was operating an indus-

try (the President having taken charge of the mines pursuant to his authority in a national emergency); and 2) the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction". Id. at 290.[5]

The court emphasized that the trial court's action would be proper only "where . . . the subject matter of the

[5] Mine Workers, supra, is often cited in proceedings wherein a trial court is held to have inherent injunctive powers to preserve the status quo pending a later determination as to its jurisdiction. Chicago and N.W. Ry. Co. v. United Transp. Union, 422 F.2d 979, 984-85; Stewart v. Dunn, 363 F.2d 591, 598 (5th Cir. 1966); United States v. Thompson, 319 F.2d 665, 667-68 (2d Cir. 1963); Fong Sik Leung v. Dulles, 226 F.2d 74, 78 (9th Cir. 1955).

suit, as well as the parties, was properly before the Court" and "where the elements of federal jurisdiction were clearly shown." Id. at 294. Thus, the Court in Mine Workers carved out a genuine exception to the Act--an exception, moreover, which Congress could have subsequently altered had it so desired. This is quite different from the present case, which appears to alter the well-settled meaning of a fundamental Constitutional amendment without articulating any cogent rationale for such alteration.

Finally, the majority cites Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969). In Nestor, the District of Columbia Circuit Court considered Sec. 10(b)(3) of a 1967 Act, 50 U.S.C. § 460 (b)(3) (Supp. IV, 1965-1968) which pre-

cluded all preinduction federal review of selective service draft classifications. The Nestor Court cited Ostereich v. Selective Service Board No. 11, 393 U.S. 233 (1968) which held that where the right to a deferrment is absolute rather than a discretionary question of fact (as in conscientious objection), Congressional intent was not to preclude judicial review in federal courts. Thus, Nestor also involved the interpretation of Congressional intent which distinguishes it from Treasure Salvors II, involving the firmly established application of a Constitutional amendment. In Nestor, had Congress disagreed with the court's interpretation of its intent, it could have subsequently made its wording more explicit. Nestor also involved an issue of significant national interest

during a period of international crisis, and, thus, review by the federal courts was far more compelling than in the instant case.

The final justification offered by the majority in Treasure Salvors II is that, since federal courts have exclusive jurisdiction over admiralty in rem actions, there is a type of jurisdiction by necessity. It is true, as pointed out in Madruga v. Superior Court of California, 346 U.S. 556 (1954) in dicta, that in rem admiralty actions are the exclusive domain of federal courts. However, in rem admiralty jurisdiction was never intended to take precedence over the eleventh amendment.

Where there is an action against a state involving maritime matters, in personam jurisdiction is reserved to state courts under the savings to suit-

ors clause. 28 U.S.C. §1333(1) (1970). See Red Cross Line v. Atlantic Trust Co., 264 U.S. 109, 123-125 (1924); see also Gulf Offshore Co. v. Mobil Oil Corp., 49 U.S.L.W. 4920 (July 1, 1981). Justice does not require that a plaintiff have every procedural avenue open to him; rather, there must be some avenue open so as not to preclude one from his day in court. Indeed, The Queen City, so heavily relied upon by the majority, dismissed a maritime in rem case because federal jurisdiction was barred by the eleventh amendment.

D. THE STATE OF FLORIDA HAS A DUTY TO PRESERVE AND PROTECT ITS HISTORIC RESOURCES.

The action by Treasure Salvors, Inc. seeks to deprive the State of Florida of possession of historic artifacts--artifacts acquired as a direct result of the State's performance of its obligation to

acquire, preserve, and protect historic properties. See, e.g. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

The Department of State, Division of Archives, History and Records Management, Bureau of Historic Sites and Properties is charged with the responsibility to:

> Locate, acquire, protect, preserve and promote the location, acquisition and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof.

Fla. Stat. §267.061(2)(a)(1979). Since 1965, when Florida first expressed concern over underwater archeological re-

sources, eleven states have expressly included sunken shipwrecks within the protection of their antiquities legislation.[6]

Preserving cultural and historical resources has become a national policy in

[6] Ga.Code §40.813(a)(1978); Ind. Code §14--3--3--3-1(m)(Cum.Supp. 1980); La. Rev. Stat. Ann. tit. 41 §§1601 & 1605 (1974); Mass. Gen. Laws Ann. ch. 6 §§179-180 (1977); Miss. Code Ann. §39-7-9 (1972); N.C. Gen. Stat. §§ 121-22-121-28 (1981); R.I. Gen. Laws §§42-45.1-3 --42-45.1-4 (1977); S.C. Code §§54--7-210---54--7-280 (Cum. Supp. 1980); Tex. Civ. Code Ann. tit. 9 §§ 191.001--191.174 (Supp. 1979); Vt. Stat. Ann. tit. 22 §§701, 781-782 (1978); Va. Code §10-145.9 (Cum. Supp. 1980).

Other states, while not referring to sunken or abandoned ships, include submerged or underwater sites in their protection of archeological resources. See Alaska Stat. §§41.35.020 (1977); Colo. Rev. Stat. §24-80-401 (1973); Hawaii Rev. Stat. §§6E-2 & 6E.7 (1976); Me. Rev. Stat. Ann. tit. 27 §§371

the United States.[7] Indeed, this Court has long recognized that protection and preservation of historic landmarks is a proper governmental objective for the exercise of the power of eminent domain. United States v. Gettysburg Electric Railway, 160 U.S. 668 (1896); Roe v. Kansas ex rel. Smith, 278 U.S. 297 (1929).

and 373 (1969); Mich. Comp. Laws Ann. §299.51, 1929 P.A. 173, §1 as amended by 1980 P.A. 184 (1980); Minn.Stat. §§138.31 & 138.37 (1980); Or. Rev. Stat. §§273.705(a), 273.722, 273.728, 274.005(7), 274.025 (1979); Wash. Rev. Code §27.53.040 (1979); Wis. Stat. §§27.012(1)--27.012(9) (1975).

[7] See Note, Cultural Resources Preservation and Underwater Archeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute, 15 San Diego L. Rev. 623, 654-60 (1978). See also National Historic Preservation Act of 1966, 16 U.S.C. §470 (1970), which declares: "The spirit and direction of the nation is founded upon and reflected in its historic past; ...the historical and cultural foundations of the nation

Most recently, the Court reart-iculated this premise in a case involving a city's use of the police power in order to effectuate landmark preservation, stating that "New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." Penn Central Transporatation Co. v. City of New York, supra, at 129; see also Maher v. City of New Orleans, 516 F.2d 1051, 1060-61 (5th Cir. 1975); A-S-P Associates v. City of Raleigh, 258 S.E.

should be preserved...in order to give a sense of orientation to the American people; [and] it is...necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities, [and] to give maximum encouragement to agencies and individuals undertaking preservations [as well as] State and local governments."

2d 444, 449-51 (N.C. 1979); Figarsky v. Historic District Commission, 171 Conn. 198, 368 N.E. 2d 163, 169-70 (Conn. 1976); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 557 (Mass. 1955).

The State of Florida submits that, under the auspices of Chapter 267, supra, a marine res with historical and cultural significance should not be granted any less protection than a historic building or landmark. It is unquestioned that the state's police power has been used to preserve and regulate the use of valuable resources necessary for the public welfare. Skiriotes v. Florida, 313 U.S. 69 (1941). The Court has also permitted states to regulate traditionally maritime activities so long as these regulations were related to essential state police

power interests. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-43 (1960); Kelly v. Washington, 302 U.S. 1, 9-10 (1937).[8]

In another case upholding a state's exercise of its police power respecting maritime activities, the Court emphasized the absence of an express preemption of state action in the federal statute (oil spill regulations), and the inability of the federal law to fully address and remedy matters of legitimate concern to the state. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973). It naturally follows, particularly since

[8] In each of these cases, had the states exceeded their police power authority, it cannot be doubted that the state courts stood ready and able to adjudicate citizens' claims. See, e.g., State of Fla., Dep't of Transp. v. Edward M. Chadbourne, Inc., 382 So.2d 293, 296 (Fla. 1980); State v. Millington, 377 So.2d 685 (Fla. 1979).

federal legislation was found not to apply to the Atocha in Treasure Salvors I, that the State of Florida's engaging in antiquities salvage with Treasure Salvors pursuant to Chapter 267 was a necessary and proper governmental function.[9]

In summary, eleventh amendment immunity, absent a finding that the state consented, has been recognized in numerous cases involving a suit in federal court by private parties against the state. The importance of the issue presented to this Court by Treasure Salvors II, however, transcends the State

[9] See Lawrence, State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources, 32 Miami L. Rev. 291 (1977).

of Florida's duty to preserve and protect its historic properties. The significance of this case lies in the fact that the Court below summarily withdrew from the states within the Fifth Circuit a fundamental constitutional protection. By ignoring the eleventh amendment argument presented by the State and considering the substantive claim of Treasure Salvors, Inc., the Court has intruded upon a constitutional guarantee still enforced by this Court and certainly not abrogated by the State of Florida.

II. THE ALLEGED MISTAKE OF FACT FOUND BY THE COURTS BELOW TO CIRCUMVENT THE ELEVENTH AMENDMENT WAS THE RESULT OF A MISINTERPRETATION OF UNITED STATES V. FLORIDA, WHICH DEFINED FLORIDA'S BOUNDARIES ONLY FOR PURPOSES OF THE SUBMERGED LANDS ACT.

Not only did the Court of Appeals misinterpret the eleventh amendment's

application to the present case, but it also ignored the Report of the Special Master adopted in United States v. Florida, 420 U.S. 531 (1975), as well as the decision itself, which established the State's boundaries, as between Florida and the United States, for purposes of the Submerged Lands Act only. The court, when it held that the Master's Report adopted in United States v. Florida, supra, effectively placed the Atocha outside Florida's boundaries, then concluded that the salvage contracts entered into between the State and Treasure Salvors were founded upon a mutual mistake of fact, and thus were null and void. Treasure Salvors II at 1349.[10] It was in this fashion that

[10] The State of Florida contends, on the other hand, that if there were a mistake at all, it was a mistake of law and not of fact. See discussion infra, at 104 et. seq.

the court decided that the eleventh amendment did not apply to the litigation, since the "land [and thus, the artifacts] never belonged to Florida." Id. at 1350.

It is Florida's position that although the Special Master's Report in United States v. Florida effectively placed the Atocha outside its boundaries as established for purposes of the Submerged Lands Act, that Act does not address non-natural resources, such as antiquities. Thus, the fully executed contract entered into between the State of Florida and Treasure Salvors, Inc. was valid and part of a continuing program of control over the salvaging of ancient shipwrecks within the State's historical and Constitutional boundaries.

A. THE REPORT OF THE SPECIAL MASTER IN UNITED STATES V. FLORIDA DOES NOT PRECLUDE FLORIDA'S CONTINUING ACTS OF SOVEREIGNTY WITHIN HER HISTORICAL AND CONSTITUTIONAL BOUNDARIES.

The contracts in dispute in Treasure Salvors II were entered into between the State's Division of Archives and Treasure Salvors, Inc. on the assumption that the Division exercised control over antiquities found within State boundaries as defined by Florida's 1968 Constitution. Fla. Const. art II, § 1 (1968). These boundaries were in effect in 1971, the year of the first salvage contract, and are the same as those claimed today. Fla. Const. art. II, §1 (1979).

The Atocha lay well within those boundaries, having originally been plotted by Treasure Salvors to lie within 2500 yards from a point at 24°31.5' North

Latitude and 82°50' West Longitude.[11]

Approximately one month after the last division of artifacts, in March 1975, the Supreme Court decided United States v. Florida, 420 U.S. 531, which affirmed the report of the Special Master, Albert B. Maris.[12] The Court

[11]Two later amendments to the location description were filed, subsequent to the District Court's decision below, the last amendment describing an area encompassing an axis from the initial point to a second point at coordinates 24°30' North Latitude and 82°15' West Longitude, a distance approximately 9500 yard from point to point, extending 2500 yards on each side of the axis. See Relevant docket entries, JA 3-4.

[12] A supplemental Report of the Special Master regarding the further determination of Florida's boundaries in Florida Bay was subsequently adopted in United States v. Florida, 425 U.S. 791, (1976).

of Appeals below interpreted that Report as:

> . . .rejecting Florida's ownership claim of submerged lands, including that part of the continental shelf on which the Atocha rests. The report established that Florida had never owned an interest in any of the lands involved in the case at bar.

Treasure Salvors II at 1343. The State contends that the Fifth Circuit misinterpreted the recommendations of the Special Master, disregarded portions of the Report which clearly recognized Florida's continuing right to exercise jurisdiction in the waters wherein the Atocha lies, and in so doing imputed motives that questioned Florida's good faith contractual transactions.

At the beginning of his Report dated January 18, 1974, in United States v.

Florida, No. 52 Original, the Special Master states:

> This proceeding involves the determination of the extent of the rights of the State of Florida, as against the United States, to the seabed and subsoil of the continental shelf seaward of its coastline on the Atlantic Ocean and the more precise determination than has heretofore been made of the extent of those rights seaward of its coastline in the Gulf of Mexico.

Report of Albert B. Maris, Special Master, United States v. Florida (No. 52 Original at 1, January 18, 1974) [hereinafter Master's Report].[13] He then summarizes the relief sought by the United States against the State of

[13]The Master's Report was received and ordered to be filed on February 19, 1974. United States v. Florida, 415 U.S. 905, (1974). It is frequently this date which is referred to in identifying this particular Report.

Florida as a decree "defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which the State of Florida has rights to the natural resources and beyond which the United States has those rights." (emphasis supplied). Master's Report at 2. Relief sought by the United States with respect to Florida's rights to the seabed's natural resources in the Gulf of Mexico was also at issue in this Report. Master's Report at 36-47.

The State contends that the raison d'etre for United States v. Florida and the Master's Report adopted therein was the need for a determination of Florida's boundaries for purposes of the Submerged Lands Act of 1953, 43 U.S.C. §1301 et seq. Master's Report at 2-3. Certain subsubsidiary questions were required to

be decided, such as the location of the dividing line between the Atlantic Ocean and the Gulf of Mexico and the location of the State's 1868 constitutional boundaries; but the principal thrust of the Report is to determine the respective proprietary rights of the federal and state governments to the natural resources of the seabed adjacent to Florida's landward boundaries. Master's Report at 6, 11; see also United States v. Florida, 425 U.S. 791 (1976); 363 U.S. 121, 128-129 (1960); 364 U.S. 502 (1960). Thus, if there is a seabed dispute in the present case, that dispute is between the United States and the State of Florida and not between Florida and one of its citizens.

The Master's Report begins with the recognition that the Supreme Court's 1960 holding in United States v. Florida, 363

U.S. at 128 (with respect to Congress's approval of Florida's Gulf boundaries under the 1868 Constitution as being boundaries "heretofore approved" for purposes of the Submerged Lands Act) was also applicable to the Atlantic boundary claimed in the same Constitution. Master's Report at 7-8.[14] The Master next proceeded to note the changes in Florida's Constitutional boundaries, primarily the 1962 amendment[15] (following passage of the Submerged Lands Act), Master's Report at 11, 15, and concluded:

[14]The significance of the 1868 Constitution is that this was the constitution which Florida adopted in order to be readmitted to the Union following the Civil War, of which Congress had "approved" for purposes of the Submerged Lands Act. See 43 U.S.C. §1301(a)(2).

[15] Fla.Const. art.1 (1963).

> It necessarily follows that the State of Florida is entitled under the Submerged Lands Act, as against the United States, to title to and ownership of the lands beneath the navigable waters and the natural resources within such lands and waters seaward for a distance of three geographical miles, but no farther, along its entire Atlantic coastline as defined in that Act. (emphasis supplied)

Master's Report at 17.

Acknowledging that the Submerged Lands Act grants Florida rights in the seabed of up to three leagues in the Gulf of Mexico and three miles in the Atlantic Ocean, the Master then determined the dividing line between those two bodies of water, Master's Report at 18 et seq.; and next, the exact location of the 1868 State boundaries. Master's Report at 21 et seq.

This particular portion of the

Master's Report lends even more support to Florida's argument that it may continue its acts of sovereignty within boundaries wherein the Atocha lies, so long as such acts do not conflict with the purposes of the Submerged Lands Act, because the Master interprets the 1868 boundary such that the Atocha lies well within the mark. Master's Report at 24; see also Master's Appendix at 84 (Section of Coast and Geodetic Chart C.&G.S. 1113, attached to Master's Report).

The Master finally proceeds, in Section B(6) of his Report, to his central task: "the location of the present State boundaries for purposes of the Submerged Lands Act." Master's Report at 32. He states:

> The findings which I have made with respect to the precise location of the boundary line of the State of Florida as

described in its 1868 Constitution have been made at the request of the parties. As I have already pointed out, however, the Submerged Lands Act of 1953 expressly authorized the State to extend its existing boundary in the Atlantic Ocean a full three geographical miles seaward from its Atlantic coastline. The Florida Act of May 31, 1955 and its 1962 Constitutional amendment took advantage of this statutory authority to extend out to the three-mile limit those portions of its Atlantic coastal boundary which lie along the coast or within three miles of it. Being thus expressly authorized by the Submerged Lands Act, this revised Atlantic coastal boundary is the boundary on that coast approved by Congress within the meaning and for the purposes of the Act, and is, therefore, in my opinion the only Atlantic coastal boundary which is of any significance in this proceeding. A further seaward extension of the north- ern section of the Atlantic

> coastal boundary purporting to have been made by the Florida revised Constitution of 1968 does not meet the definition of the Submerged Lands Act and has not been approved by Congress. It is, therefore, of no significance in determining the issues involved in this proceeding. (emphasis supplied)

Master's Report at 32-33.

The State contends that this language squarely indicates that the Special Master's focus and primary concern was Florida's boundary as contemplated in the Submerged Lands Act. The Master neither discounts nor disapproves Florida's boundaries for other purposes; he simply states that whatever boundary Florida may have historically claimed, or whatever boundary it may claim in the future, is of no significance as concerns the United States' seabed grant of natural resources authorized by the Submerged Lands Act.

The Report acknowledges the changes made by the 1968 Constitution and concludes that they are irrelevant for purposes specifically defined in the Submerged Lands Act. That portion of the 1968 Constitutional boundary (which is of significance to the Atocha's resting place) proceeds as follows (beginning at the northernmost point on Florida's east coast):

> [from the middle of the St. Mary's River]. . .to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three

> leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from the Loggerhead Key, the westernmost of the Dry Tortugas Islands; . . . (emphasis supplied)

Fla. Const. art. II, §1 (1968).

Thus, not only does it become apparent that the Atocha lies within boundaries historically claimed by the State of Florida, but the Master goes on to unequivocally distinguish Florida's boundaries for purposes of the Submerged Lands Act from its boundaries for other purposes. He acknowledges that under both the 1868 and 1962 Constitutions, "the State boundary is described as extending to and around the Dry Tortugas Islands." Master's Report at 33 (emphasis supplied). He then deduces that the historical (and present)

boundary includes the large area of open water between the Marquesas Keys and the Dry Tortugas (in which the Atocha lies) which is more than three geographical miles or even three marine leagues from the coastline of either group of islands. The Master then states:

> Accordingly, the area of open water in the Atlantic Ocean more than three miles from the coastlines of the Marquesas Keys and the Dry Tortugas Islands and in the Gulf of Mexico more than three leagues therefrom cannot be included within the boundaries of the State of Florida for the purposes of defining the grant of the seabed and its resources made by the Submerged Lands Act. Whether this area of open water between the Marquesas and the Dry Tortugas may be considered to be within the boundaries of the State for other purposes is not involved

> in this proceeding and need not now be decided. (emphasis supplied)

Master's Report at 33-34; see also Master's Report at 30. The Master continues:

> The Dry Tortugas Islands are a part of the territory of the State of Florida. They were included within the State boundary described in the State Constitution of 1868 which, as we have seen, was approved by Congress in 1868 and their status as Florida territory has never been questioned. But for the purposes of the State boundary recognized by the Submerged Lands Act these islands must be regarded as constituting detached insular territory of the State with a separate boundary of their own. (emphasis supplied)

Master's Report at 34-35.

It is obvious from the above that the "mistake of fact" which the Court in Treasure Salvors II found to have invalidated the salvage contract was the

result of an erroneous reading of the Master's Report in United States v. Florida. The waters within which the Atocha's archaeological remains were found had historically been claimed by the State of Florida, which in this instance sought to protect one of its most fragile cultural resources, the vestiges of the Spanish colonial fleets as they wended their way through Florida's treacherous reefs before striking across the Atlantic and back to the Old World.

B. THE DETERMINATION MADE BY THE FIFTH CIRCUIT AS TO THE APPLICABILITY OF UNITED STATES V. FLORIDA WAS ERRONEOUS.

The Submerged Lands Act, 43 U.S.C. §1301 et. seq., was passed in 1953 as a response to United States v. California, 332 U.S. 19 (1947), and its progeny.

See United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). United States v. California in 1947 held that California did not have right of ownership in the resources underlying waters seaward of the mean low water line. The concern in that case was oil and the implications of its off-shore development for national defense:

> As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt.

332 U.S. at 31.

This decision was subsequently limited by the Court in United States v. Louisiana, in 1950. There, the Court stated, with regard to claims beyond the

three-mile limit:

> We intimate no opinion on the power of a State to extend, define, or establish its external territorial limits or on the consequences of any such extension vis a vis persons other than the United States or those acting on behalf of or pursuant to its authority. (emphasis supplied)

339 U.S. at 705; see also Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 n.4 (1977).

This decision is significant with regard to the present litigation in that the Atocha rests in waters historically claimed by Florida which are outside the three mile belt. See discussion, supra. Thus, from the start, the Atocha-type situation was excluded from the scope of United States v. California.

The decision in United States v. California created concern that perhaps

the riparian states could better supervise the development of oil resources. The resulting legislation, The Submerged Lands Act of 1953, supra, "returned" to the affected states the ownership of off-shore natural resources found within three miles of the coastline (three leagues in the Gulf of Mexico).

The legislative history of the Act demonstrates that oil was the primary concern in its passage:

> In this almost interminable debate over the disposition of these submerged lands, one area of agreement shines like a beacon in this sea of debate--that is the acute and vital necessity of the immediate enactment of legislation to promote the exploration and development of the petroleum deposits known to be located in these areas.

H.R. Rep. No 215, 83d Cong., 1st sess. 2, reprinted in [1953] U.S. Code Cong. & Ad. News 1386.

Indeed, the Act refers only to natural resources:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and respective grantees, lessees, or successors in interest thereof; . . .

43 U.S.C. §1301(a); and it defines them as follows:

> The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp

> and other marine animal and plant life but does not include water power, or the use of water for the production of power; . . .

43 U.S.C. §1301(e).

Neither the Submerged Lands Act nor its companion legislation, the Outer Continental Shelf Lands Act, 43 U.S.C. §1332(a)(2) (extending federal resource jurisdiction to the "subsoil and seabed" outside the three mile/three league belt) vest regulatory power in federal or state sovereigns over non-natural resources, such as marine antiquities.[16] What is more, judicial construction has implied that neither Act is applicable to underwater cultural resources. See, e.g., United States v. Maine, 420 U.S. 515, 527-28 (1975); United States v.

[16] See Lawrence, State Antiquity Laws and Admiralty Salvage: Protecting Our Cultural Resources, 32 Miami L. Rev. 291, 321 (1977).

California, 381 U.S. 139, 148-49 (1965); United States v. Louisiana, 363 U.S. 1, 5 (1960); State v. Bundrant, 546 P.2d 530, 545-47 (Alaska 1976) appeal dismissed, 429 U.S. 806 (1976).

Upon the passage of both Acts, profuse litigation ensued to determine the location of the boundaries dividing the federal interest from that of the various coastal states. This court determined at the outset that: 1) It was the intent of Congress to allow judicial determination of the precise boundaries under the Submerged Lands Act; and 2) the Geneva Convention on Territorial Waters and the Contiguous Zone was the authoritative source for making that determination. United States v. California, 381 U.S. 139, 150-67 (1965);

United States v. Louisiana, 394 U.S. 11, 30-51 (1969).

Florida, as a state with both Atlantic and Gulf of Mexico shores, was drawn into litigation surrounding the determination of boundaries in both waters. A Special Master was appointed and the causes were consolidated in United States v. Florida, infra. The Court's opinions in United States v. Florida, found at 420 U.S. 531 (1975) and 425 U.S. 791 (1976), contain within them limitations on the scope of the decision which conform to the general concern over ownership and development of natural resources:

> The case consolidates two proceedings. In the first, the United States seeks a decree defining the seaward boundary of the submerged lands of the continental shelf in the Atlantic Ocean in which Florida

has rights to the natural resources. 395 US 955, 23 L Ed 2d 743, 89 S Ct 2095 (1969). In the second, the State of Florida and the United States seek a decree defining more specifically than does the decree entered in United States v Louisiana, 364 US 502, 5 L Ed 2d 247, 81 S Ct 258 (1960), the seaward boundary of the submerged lands of the continental shelf in the Gulf of Mexico in which Florida has rights to the natural resources. 403 US 949, 29 L Ed 2d 861, 91 S Ct 2272 (1971). (emphasis supplied)

420 U.S. at 532 (1975); and:

As against the United States, the State of Florida is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues from its coastline or its historic coastline, whichever is landward, but for not less than 3 geographic miles from its coastline; the United States is not entitled, as against the State of Florida, to any interest in such lands, minerals, or resources. (emphasis supplied)

425 U.S. at 792 (1976).

These clear references to "natural resources" place the decision in United States v. Florida in the line of cases which began with United States v. California, 332 U.S. 19, in 1947 and the Submerged Lands Act of 1953; that is, it falls into the category of decisions and legislation concerning the determination of the ownership of natural resources. Neither the Submerged Lands Act nor either of the 1975 and 1976 decisions in United States v. Florida makes any determination concerning the exercise of sovereignty over salvage operations on archaeological sites in waters historically claimed by the states. The location of the Atocha's remains is approximately three leagues southeast of the Marquesas Keys; this site is well

within any conceivable construction of the state's 1868 boundaries, and is in an area over which Florida has historically and logically exercised sovereign rights. Until the decision in United States v. Florida, neither of the parties to the salvage contract doubted that Florida had sovereignty over the waters in question; both performed fully under the contract. Since the wreck is not within the subject matter of the Act or any decision by the Court making determinations under the Act, it was error for the Fifth Circuit to utilize United States v. Florida to place the State within its jurisdiction over the strenuous assertion of eleventh amendment immunity.

The Atocha's remains are not a natural resource. They are historical

antiquities, a sample of which the State of Florida seeks to preserve for the benefit of present and future generations of Floridians and non-Floridians alike. It was not within the scope of the Submerged Lands Act to allocate the rights of sovereignty possessed by Florida in waters such as those between the Dry Tortugas and the Marquesas Keys. Rather, the Act was intended to make a division of interests in natural resources as between Florida and the United States only. Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. at 371. The Submerged Lands Act, and case law construing it, cannot and should not be used to determine sovereignty over cultural resources, or the validity of salvage contracts executed by a State with regard thereto.

C. THE COURT OF APPEALS INCORRECTLY APPLIED THE DOCTRINE OF MISTAKE OF FACT BECAUSE, IF A MISTAKE OCCURRED AT ALL, IT WAS A MISTAKE OF LAW, WHICH DOES NOT INVALIDATE A CONTRACT.

The Court of Appeals, citing the well-known case of Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887), concluded that Florida had contracted with Treasure Salvors, Inc. upon the mistaken assumption that the Atocha lay within its territorial waters. Treasure Salvors II at 1349. The court, reading United States v. Florida to hold that the submerged land upon which the Atocha rested had never been owned by Florida, thus attempted to circumvent the eleventh amendment's bar to the proceeding.

As is obvious from the foregoing discussion, however, the mistake, if any, was a mistake of law and not of fact. Certainly, the Atocha did not move. The

"fact" of its resting place, for the duration of the parties' contractual relationship, remained as designated in the Complaint. JA 5. See also Salvage Contract "S-8-C", JA 20. What did change, at most, was the legal interpretation of its location relative to sovereign territorial control.

The Special Master in United States v. Florida, 420 U.S. 531 (1975) recognized that Florida had historically claimed a boundary inclusive of the waters between the Marquesas Keys "to and around" the Dry Tortugas Islands. Master's Report at 33; 30. The State of Florida, Department of State and Treasure Salvors, Inc., therefore, were contracting on the basis of the "law" as described in article II, §1 of the 1968 Constitution when they reached an agreement in April 1971.

The contract, renewed three more times, was fully executed and performed by the time the "law" allegedly changed with the decision in United States v. Florida, 420 U.S. 531, in March 1975. The mistake of law, if any at all, consisted of the Special Master's re-interpretation of Florida's territorial boundaries for purposes of another "law", the Submerged Lands Act of 1953.

It is hornbook law that a mistake of law is not grounds for rescission of a contract. Heath v. A. B. Dick Co., 253 F.2d 30, 35 (7th Cir. 1958). It has likewise been held that reformation of a contract will not be granted upon an alleged mistake of law, National Union Fire Insurance Co. of Pittsburg, Pennsylvania v. D. & L. Construction Co.,

353 F.2d 169, 174 (8th Cir. 1965) and neither will an estoppel. Dampskibs Aktieselskabet Thor v. Tropical Fruit Co., 281 F. 740, 742 (2d Cir. 1922).

The State of Florida thus urges that, although the Report of the Special Master did not preclude Florida's continuing exercise of her police power in the waters where the Atocha lies, any alleged mistake which could have affected the parties' understanding was a mistake of law and not of fact. Such a conclusion is particularly just since the contract was fully executed and performed by the time the action in the Courts below sought to take the artifacts out of the State's possession.

The Court, in its mistaken interpretation of United States v. Florida, compounded its error by misapplying

contract principles. Neither of these errors should be allowed to avoid the eleventh amendment's postulate that a state may not be sued in federal court without its consent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JIM SMITH
Attorney General

SYDNEY H. McKENZIE, III.
Chief Trial Counsel

SUSAN E. GAMBLE
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

-and-

FLETCHER N. BALDWIN, JR.
Holland Law Center
University of Florida
Gainesville, Florida 32611
(904) 392-2211

APPENDIX

FLORIDA CONSTITUTION (1868)

ARTICLE I

BOUNDARIES

The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; . . . thence straight to the head of the St. Marys river; thence down the middle of said river to the Atlantic ocean; thence southeastwardly along the edge of the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning.

FLORIDA CONSTITUTION (1963)

ARTICLE I.

BOUNDARIES

The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16' 53" north and longitude 87° 31' 06" west intersect; . . . thence in a straight line to the head of the St. Mary's River; thence down the middle of said river to the Atlantic Ocean, and extending therein to a point three geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three geographic miles distant from the Atlantic coast

line of the state and three leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three leagues distant from the coast line, to a point three leagues distant from the coast line of the mainland;

* * *

The legislature may extend the coastal boundaries to such limits as the laws of the United States or international law may permit.

ARTICLE II

GENERAL PROVISIONS

SECTION 1. State boundaries.--

(a) The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16' 53" north and longitude 87° 31' 06" west intersect; . . . thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean; thence due east to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever

is greater, to and through the Straits of Florida and westerly, including the Florida reefs, to a point due south of and three leagues from the southernmost point of the Marquesas Keys; thence westerly along a straight line to a point due south of and three leagues from Loggerhead Key, the westernmost of the Dry Torgugas Islands; thence westerly, northerly and easterly along the arc of a curve three leagues distant from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida; thence northerly and westerly three leagues distant from the coastline to a point west of the mouth of the Perdido River three leagues from the coastline as measured on a line bearing south 0° 01'

00" west from the point of beginning; thence northerly along said line to the point of beginning. The State of Florida shall also include any additional territory within the United States adjacent to the Peninsula of Florida lying south of the St. Marys River, east of the Perdido Rover, and south of the States of Alabama and Georgia.

(b) The coastal boundaries may be extended by statute to the limits permitted by the laws of the United States or international law.

§ 1301. Definitions

When used in this chapter--

(a) The term "lands beneath navigable waters" means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast

line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title

but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

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(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp,

and other marine animal and plant life but does not include water power, or the use of water for the production of power;

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